

In the Matter of Sonny Washington,
Township of Berkeley
DOP Docket No. 2004-4429
(Merit System Board, decided February 8, 2006)

The appeal of Sonny Washington, a Truck Driver with the Township of Berkeley, of his 15-day suspension, beginning May 13, 2004, on charges, was heard by Administrative Law Judge Patricia M. Kerins (ALJ), who rendered her initial decision on December 29, 2005. No exceptions were filed by the parties.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on February 8, 2006, accepted and adopted the Findings of Fact and Conclusions, as contained in the attached ALJ's initial decision, but did not adopt the ALJ's recommendation to uphold the 15-day suspension. Rather, the Board increased the penalty to a six-month suspension.

DISCUSSION

The appellant was charged with conduct unbecoming a public employee, discrimination that affects equal employment opportunity, and violation of the Township's discrimination and harassment policy. Specifically, the appointing authority asserted that the appellant, on numerous occasions between January 2004 and May 2004, made inappropriate sexual comments towards Christopher Hasse, a Laborer, Heavy, and touched Hasse in a sexual manner. Additionally, it was alleged that the appellant verbally and physically threatened Hasse. The appellant received a 15-day suspension and was ordered to attend sexual harassment training. Upon the appellant's appeal to the Board, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In her decision, the ALJ sets forth the testimony of Hasse and the appellant. Hasse described what the appellant said to him and where he touched him. He maintained that the appellant's frank discussions of sex between men and his offensive touching escalated over the months despite Hasse's protestation to the appellant. Additionally, Hasse testified that, in early May 2004, the appellant "came after" him in the truck and Hasse told the appellant to "go to hell." In response, the appellant threatened Hasse that "something bad would happen" to him if he reported the incidents to anyone. Thereafter, Hasse reported the appellant's conduct to his supervisor. In his testimony, the appellant denied verbally or physically harassing Hasse. He claimed that Hasse was the one who talked about sex on a regular basis. However, the ALJ found Hasse to be more credible than the appellant. She stated that it was clear that Hasse was embarrassed by the subject of his testimony and unlikely that he would have fabricated his story. Additionally, although the ALJ said that it was not believable

that the men never discussed sex, it was more likely that the appellant initiated the sexual banter, which led to more offensive discussions and disturbed Hasse. Therefore, the ALJ concluded that the charges against the appellant were sustained and recommended that the 15-day suspension be upheld and the appellant attend sexual harassment training. In recommending upholding the 15-day suspension, the ALJ indicated that although the appellant's conduct was offensive and egregious in nature, she considered the fact that Hasse only wished that the conduct cease and he did not express the need for a more severe discipline. Moreover, the ALJ considered the appellant's lack of prior discipline.

Initially, with regard to the charges, the Board agrees with the ALJ's conclusion that the charges have been sustained. The ALJ found that Hasse was more credible than the appellant. In this regard, the Board acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto*, *supra*). The Board appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Board has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri v. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). Nevertheless, upon review, the ALJ's determinations in this respect are proper.

The Board, however, disagrees that the appellant's conduct only warrants a 15-day suspension. Due to the egregiousness of the appellant's offenses, a six-month suspension is warranted. N.J.S.A. 11A:2-19 specifically provides that the Board "may increase or decrease the penalty imposed by the appointing authority." The only limitation on this authority, which was expressly conferred by the Legislature, is that "removal shall not be substituted for a lesser penalty." *See also N.J.A.C. 4A:2-2.9(d)*. Increases in disciplinary penalties have been upheld in prior cases, where the circumstances warranted such an increase. *See Sabia v. City of Elizabeth*, 132 N.J. Super. 6 (App. Div. 1974); *In the Matter of Craig Davis, South Woods State Prison, Department of Corrections*, Docket No. A-4345-02T3 (App. Div. August 2, 2004); *Dunn and Shogeke v. Merit System Board*, Docket No. A-4645-96T1 (App. Div. March 20, 1998); *In the Matter of Richard A. Sheppard* (MSB, decided December 17, 2003); *In the Matter of Frederick Dusche* (MSB, decided April 23, 2003). Moreover, it is recognized that, in determining the propriety of a penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 N.J.A.R. 2d (CSV) 463, 465. Although

the Board applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 N.J. 571, 580 (1980).

In the instant matter, the appellant's conduct was extremely offensive and egregious. Therefore, his prior disciplinary record does not mitigate the penalty to be imposed. The appellant's conduct warrants the most severe penalty the Board can impose in this case. It is of no moment that Hasse did not request more discipline for the appellant. The Board will not tolerate the appellant's conduct or condone it. The six-month suspension should serve as a warning to the appellant that future offenses may result in his removal. Therefore, the Board modifies the penalty to a six-month suspension and orders that the appellant undergo sexual harassment training.

ORDER

The Merit System Board finds that the action of the appointing authority in imposing disciplinary action was justified. However, the Board modifies the penalty of a 15-day suspension to a six-month suspension and orders that the appellant undergo sexual harassment training. Therefore, the Board dismisses the appeal of Sonny Washington.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.